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U.S. Department of Homeland Security

Citizenship and Immigration Services

ADMINISTRATIVE APPEALS OFFICE
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[redacted]

File: EAC 02 014 52561 Office: VERMONT SERVICE CENTER Date: APR 22 2004

IN RE: Petitioner:
Beneficiary [redacted]

Petition: Immigrant petition for Alien Worker as a Skilled Worker or Professional pursuant to section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

ON BEHALF OF PETITIONER: [redacted]

INSTRUCTIONS:
This is the decision in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The Director, Vermont Service Center, denied the preference visa petition. The director dismissed a subsequent motion to reopen or reconsider, affirming the previous decision denying the petition. The matter is now before the Administrative Appeals Office on appeal. The appeal will be dismissed.

The petitioner is a software consulting and personnel staffing firm. It seeks to employ the beneficiary permanently in the United States as a programmer/analyst. As required by statute, a Form ETA 750 Application for Alien Employment Certification approved by the Department of Labor accompanies the petition. The director determined that the petitioner had not established that the beneficiary met the requirements for the proffered position as stated on the approved Form ETA 750 labor certification.

On appeal, counsel submits a brief.

Section 203(b)(3)(A)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(i), provides for the granting of preference classification to qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing skilled labor (requiring at least two years training or experience), not of a temporary nature, for which qualified workers are not available in the United States.

The regulation at 8 CFR § 204.5(l)(3)(ii) states:

> (B) *Skilled workers.* If the petition is for a skilled worker, the petition must be accompanied by evidence that the alien meets the educational, training or experience, and any other requirements of the individual labor certification, meets the requirements for Schedule A designation, or meets the requirements for the Labor Market Information Pilot Program occupation designation. The minimum requirements for this classification are at least two years of training or experience.
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> (C) *Professionals.* If the petition is for a professional, the petition must be accompanied by evidence that the alien holds a United States baccalaureate degree or a foreign equivalent degree and by evidence that the alien is a member of the professions. Evidence of a baccalaureate degree shall be in the form of an official college or university record showing the date the baccalaureate degree was awarded and the area of concentration of study. To show that the alien is a member of the professions, the petitioner must submit evidence that the minimum of a baccalaureate degree is required for entry into the occupation.

On the Form I-140 petition, in Part 2, Petition Type, the petitioner checked "e," indicating that the petition is for a skilled worker (requiring at least two years of specialized training or experience) or for a professional.

Eligibility in this matter hinges on the petitioner demonstrating that the beneficiary has the qualifications stated on the ETA 750 labor certification. The ETA 750 labor certification submitted in this case clearly states that the proffered position requires that the beneficiary have four years of college leading to a bachelor of science degree in computer information systems and one year of experience in the proffered position.

Because the position requires only one year of experience, and positions for skilled workers necessarily require at least two years of specialized training or experience through regulatory prescription, the

proffered position cannot be analyzed as a position for a skilled worker. It must necessarily be analyzed as a position for a professional.

With the petition, counsel submitted the beneficiary's résumé and letters from former employers detailing the beneficiary's work experience. That résumé does not indicate that the beneficiary has a bachelor's degree. Finally, counsel submitted the report of an educational evaluator that states that the beneficiary's employment experience is the equivalent of a bachelor's degree.

Counsel asserted that, pursuant to 8 C.F.R. § 214.2(h)(4)(iii)(D)(1), the educational evaluation qualifies the beneficiary for a position requiring a bachelor's degree. Counsel submitted a letter, dated September 24, 2001, from the petitioner's human relations director stating that the beneficiary has worked for the petitioner for the past few years pursuant to an H-1B1 nonimmigrant visa, and that the petitioner now wishes to employ him permanently.

Because the evidence submitted did not indicate that the beneficiary has the degree required by the labor certification, the Vermont Service Center, on November 17, 2001, requested additional evidence. Specifically, the Service Center requested evidence that the beneficiary has a bachelor's degree or an equivalent foreign degree.

In response, counsel asserted that the beneficiary has the equivalent of a bachelor's degree. Counsel agreed that the petitioner does not qualify as a professional pursuant to 8 CFR § 204.5(l)(3)(ii)(C), but asked that the petition be considered as a petition for a skilled worker pursuant to 8 CFR § 204.5(l)(3)(ii)(B). In support of the proposition that the beneficiary qualifies as a skilled worker, counsel submitted the minutes of a September 19, 2001 teleconference between the Association of Immigration Law Attorneys (AILA) and the Nebraska Service Center (NSC).

In the decision of denial, the Director, Vermont Service Center, noted that the statute and regulations governing employment-based preference immigrant visa petitions do not provide for accepting employment experience in lieu of completion of a bachelor's degree. The director determined that the evidence submitted did not establish that the beneficiary has the requisite bachelor's degree in computer information systems and, on March 8, 2002, denied the petition. The director observed that if the Form ETA 750 had permitted substitution of experience for the requisite bachelor's degree, then the analysis of the evidence might be different.

On a rejected appeal construed as a motion to reopen or reconsider, counsel asserted that the petitioner has from the beginning sought an employee with a bachelor's degree in computer information systems or the equivalent in work experience. Counsel argued that the director was obliged to consider the instant petition as a petition for a skilled worker, and that the denial was due to the director's failure to consider the petition in that light.

On August 7, 2002, the Director, Vermont Service Center responded to the motion. The director noted that the labor certification specifies that the beneficiary must possess a bachelor's degree and that counsel submitted no evidence of that degree. The director denied the motion, affirming the previous decision.

On appeal, counsel reiterated the position that under these facts the beneficiary qualifies as a skilled worker notwithstanding that he has no bachelor's degree. In support of that position, counsel again cited the teleconference between AILA and NSC.

This office notes that the position of the Service Center is not a precedent decision and does not bind CIS employees pursuant to 8 C.F.R. § 103.3(c). *See Louisiana Philharmonic Orchestra v. INS*, 44 F. Supp.2d 800, 803 (E.D. La. 2000), *aff'd.*, 249 F.3d. 1139 (5th Cir. 2001), *Cert. Denied*, 122 S.Ct. 51 (2001). This office further notes that the circumstances of the hypothetical situation posed in the minutes of the teleconference are distinguishable from those of the instant case.

In the teleconference hypothetical, the petition could be interpreted as a petition for a skilled worker because the Form ETA 750 required two years experience in the proffered position, thus supporting that the proffered position might be a position for a skilled worker. In the instant case, as was noted above, the Form ETA 750, as submitted, after considerable amendment, states that the proffered position requires one year of experience and no specialized training. A position for a skilled worker necessarily requires two or more years of specialized training or work experience. The proffered position is not a position for a skilled worker. The proffered position is a position for a professional and will be analyzed as such.

Counsel initially cited 8 C.F.R. § 214.2(h)(4)(iii)(D)(1) for the proposition that the beneficiary's work experience qualifies him for positions that require a bachelor's degree. That section, however, applies only to nonimmigrant visas for temporary employees, such as the visa the beneficiary previously held. No such allowance for degree equivalents exists for immigrant visas pursuant to 8 C.F.R. § 204.5(l). Additionally, a bachelor's degree is generally found to require four (4) years of education. *See Matter of Shah*, 17 I&N 244, 245 (Comm. 1977). Therefore, no combination of education and experience may be accepted in lieu of a four-year degree. Thus, the equivalency evaluation submitted to prove that the beneficiary's employment experience is equivalent to a bachelor's degree will not be accepted. Absent a four-year bachelor's degree and one year of work experience, the beneficiary does not qualify for the proffered position.

The petitioner failed to submit sufficient evidence that the beneficiary has a bachelor's degree, which the labor certification clearly and unequivocally states is a requirement of the proffered position. This office is unable to vary the terms of an approved labor petition.

The burden of proof in these proceedings rests solely on the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden. Accordingly, the previous decisions of the director will be affirmed, and the appeal will be dismissed.

ORDER: The appeal is dismissed.